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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 119

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Court of Appeals (Pet. 25) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1958 (Pet. 2). The petition for a writ of certiorari was filed on June 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below properly affirmed the district court's refusal to reduce a legal sentence theretofore imposed for distribution of obscene literature.

STATUTE AND RULE INVOLVED

18 U. S. C. 1461 provides in pertinent part:

> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

Petitioner's conviction in the United States District Court for the Southern District of New York for sending obscene matter through the mails in violation of 18 U. S. C. 1461 was affirmed by the Court of Appeals, 237 F. 2d 796, and by this Court in *Roth* v. *United States*, 354 U. S. 476. Petitioner moved thereafter in the District Court for a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure (R. 9).[1] The motion was denied (R. 31) and the Court of Appeals affirmed.

[1] Record references are to pages of the Appendix to Appellant's brief below.

Petitioner's sentence, which he asked to be reduced to the time served (then eight months (R. 15)), was to imprisonment for five years and a fine of $5,000 on one count, and five years and $1 remitted fine on each of three remaining counts,[2] the prison terms to run concurrently (R. 8). The facts incident to its imposition and petitioner's subsequent motion for its reduction are as follows:

On the date of sentencing, the court, with a probation office report and a memorandum submitted by petitioner before it, heard statements from opposing counsel (R. 2–7). Government counsel noted briefly that petitioner was known as one of the largest distributors of obscene material in the country, that he had been in the business for approximately forty years, and that his record of criminal convictions—both state and federal—for such activity included a three-year federal sentence imposed in 1936. He noted further that petitioner, even after his indictment on current charges, had not curtailed his mailing activities; that since indictment the Post Office had reported receipt of 1,650 written complaints from recipients of such materials. One package of magazines complained of had been mailed after trial (R. 2–3).

Defense counsel, in a lengthy plea for mercy, argued that in spite of petitioner's persistence in these mail order publishing activities, he could hardly be called a previous offender since the books involved

[2] Petitioner was convicted by a jury on four counts of a twenty-six count indictment.

in his prior convictions were not considered obscene by present day standards (R. 3–4). He stated that petitioner, 62 years of age and ailing, had had "premonitory signals", that he had since conviction expressed his desire to get out of the mail order business entirely because "he is no longer the stuff that heroes are made of", and that a prison sentence would work a great hardship on his wife and family (R. 5–6).

Before pronouncing sentence the court said in part:

> * * * according to the probation report, which I have before me, and also the brochure, if you want to call it that, which you mailed me, and which I read, as I said, twice, it appears that over a period of years you have been engaged in the type of work for which this jury found you guilty.
>
> My recollection is that there were four or five previous convictions of similar kind, they being divided between the federal courts and the state courts.
>
> And your counsel talks about premonitory signs. It seems to me, in view of that record, you had plenty of admonitory signs.
>
> I feel that you had a fair trial. The jury has rendered its verdict and found you guilty on four of the counts which were submitted to them.

In his motion for a reduction of sentence petitioner argued that the severity and length of his sentence should be re-evaluated in the light of the dissenting opinions of this Court in its decision affirming his conviction on constitutional grounds (R. 9–12, 15). He argued that the materials which he mailed

were not "hard-core pornography" (R. 12, 14). He stated that he was primarily a poet and author (R. 13), and that he had abandoned his publishing business (R. 15). He claimed that the term of imprisonment of eight months which he had then served exceeded the average of sentences imposed in obscenity cases and that a five-year sentence was tantamount to a death sentence in view of his age and physical condition (documented by an accompanying medical certificate) (R. 15, 17). He mentioned his children and grandchildren and pointed out that his wife of 40 years had suffered a nervous breakdown since his incarceration (R. 15).

In a hearing on the motion two counsel acting on behalf of petitioner urged these considerations at length (R. 18–23, 27–29).[3] A distinguished Rabbi asked for mercy on behalf of petitioner's wife and family (R. 24–25). Government counsel, in a brief statement, alluded to petitioner's prior convictions and pointed out that his guilt on four counts of the instant indictment could have resulted in a sentence of twenty years (R. 26). He stated that the jury's finding, after a full and fair trial, that the material involved was pornography had been sustained by three judges of the Court of Appeals and six judges of this Court (R. 25). He noted that family hardship is always present when a man is found guilty (R. 26).

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[3] It was also argued, as it was at the time of sentencing, that material involved in prior convictions was not in fact considered pornographic at the present time.

ARGUMENT

The sentence which petitioner has asked the Court of Appeals, and now this Court, to modify is within the allowable statutory limit in 18 U. S. C. 1461 (p. 2, *supra*). Petitioner's contention that the court which imposed it and which denied his motion to reduce it considered only his criminal record of convictions, unconstitutional by present day standards (Pet. 6, 8, 10), is refuted by the record. The sentencing court (the trial court) had before it practically all pertinent data that could conceivably be available, including details of petitioner's personal life, his family, age and physical condition, his past and present business activities, his criminal record and explanations offered in mitigation thereof, and his representations as to what his future conduct would be. Twice before sentencing it read a lengthy memorandum submitted by petitioner (R. 7–8). It indicated its familiarity with a presentence report (R. 8). It heard a lengthy plea for leniency which alleged that prior convictions for similar offenses involved materials not pornographic by present-day standards. It properly based its sentence on all these considerations.

The record further shows that these same considerations were before the same court again at the time of petitioner's motion to reduce sentence. The only new matter urged was that dissenting Justices in this Court thought the material involved not to be "hard-core" pornography.[4] Petitioner claims that government counsel's counter-assertion that the majority of

[4] See dissenting opinion of Mr. Justice Harlan. 354 U. S. at 508.

the Justices thought the material to be obscene was a misrepresentation requiring reversal (Pet. 14). If this were a misrepresentation at all,[5] however, it certainly was not a material one. Presumably the trial court was familiar with this Court's decision.

Moreover, as the Court of Appeals pointed out, it was without power to review or revise a sentence which is within permissible statutory limits. This Court has likewise pointed out its lack of power in this respect. *Rosenberg* v. *United States,* 344 U. S. 889, 890; *Gore* v. *United States,* No. 668, O. T. 1957. The decision of *Yates* v. *United States,* 356 U. S. 363, upon which petitioner relies is inapposite. That case arose in the area of criminal contempt in which this Court has carved out a special exception to the rule prohibiting appellate review of sentences in view of the Court's supervisory power in the contempt field and of the lack of legislative limitation on the sentencing power. *Green* v. *United States,* 356 U. S. 165, 188.

[5] Mr. Chief Justice Warren, concurring, found petitioner "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect" 354 U. S. at 496. Mr. Justice Brennan, speaking for the majority of the Court in affirming petitioner's conviction, found that the trial court had applied the proper definition of obscenity (p. 489) but made no independent judgment as to the character of the material.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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